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No. 07-760

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SUPREME COURT, U.S.

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In The

Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
a Corporation Organized under the
New York Religious Corporation Law,

Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES and
FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Second Department

BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Florence Risman ("Risman") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Decision and Order of the New York State Appellate Division, Second Department. The Decision and Order of the Appellate Division, Second Department is published at 32 A.D.3d 391, 820 N.Y.S.2d 104 (2nd Dept. 2006), and is reproduced in the petitioner's Appendix at 1a-5a. The trial court's order granting summary judgment, order denying renewal, and judgment, all of which are unpublished, are reproduced at petitioner's Appendix at 14a-17a, 6a-9a, and 10a-13a, respectively. As more fully described below, the New York State Court of Appeals denied petitioner's motion for discretionary review by order entered on May 3, 2007.

STATEMENT OF THE CASE

The petitioner[1] was not the record owner of, and had no interest in, the subject

[1] In dismissing as a bad faith filing the Chapter 11 bankruptcy petition filed by the petitioner during the pendency of the State Court proceedings, the Bankruptcy Court raised certain questions regarding the legitimacy of the religious nature of the petitioner. *In re: Temple Bnai Shalom of Great Neck*, Case No. 04-80808-288 (U.S. Bankruptcy Court, Eastern District, NY). As explained by the Bankruptcy Court in its March 29, 2004 order dismissing the petition:

(Continued on following page)

property[2] at the time of the subject 1998 tax sale conducted by the Village of Great Neck Estates (the "Village"). The purchaser at the tax sale was Risman. After the duly noticed and conducted tax sale, the property was sold to the petitioner by Ona Guthartz ("Ms. Guthartz"), the owner of the property at the time of the tax sale. There was never any claim made by Ms. Guthartz, or anyone claiming on her behalf, that she suffered any loss as a result of alleged insufficient notice of the tax sale.[3]

> The only personal property owned by the Temple consists of a modest number of chairs, prayer shawls, and prayer books having nominal liquidation value. Oddly enough, the Temple does not claim to own a Torah, the first five books of the Old Testament, imprinted on scrolls, a suitable covering for the Torah, and the customary silver adornments atop these scrolls. * * * There is nothing in debtor's bankruptcy papers to suggest that there are any on-going religious services at the Temple.

[2] The subject property consists of a single family home located in a residential neighborhood. Pursuant to the petitioner's petition in bankruptcy, the petitioner did not own, lease, or occupy any other real property.

[3] Petitioner, in its Statement of the Case, states that Ms. Guthartz was unaware of the sale of the tax lien. However, Ms. Guthartz is not a party to this action, and at no point during the proceedings below was there ever any affidavit or statement submitted by Ms. Guthartz, or any other evidence submitted, to support such a claim. In fact, the allegation by petitioner that notice of the tax lien sale was given by publication only was not relevant since petitioner was not the owner of the subject property at the time of the 1998 tax sale.

When purchasing the subject property, petitioner, for unexplained reasons, failed to properly perform a customary and routine title search. Such search, whether properly performed by a qualified title examiner or lay person, would have revealed the existence of any outstanding tax liens and the fact that a tax sale had taken place.[4]

In 2001, and pursuant to the requirements of New York Real Property Tax Law §1464[5], Risman sent copies of the duly prepared notice by certified mail to: (1) the petitioner, the record owner at the time notice was sent by Risman, to its business mailing address, to wit: a Post Office box, (2) Alan Guthartz, the President of the Temple, and (3) Ms. Guthartz, at the subject property. It was never contested by the petitioner that each and every envelope was correctly addressed, and that each, after multiple

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[4] The respondent Risman eventually had to pay $197,077.79 in additional Town, County, School and Village taxes, which included taxes not paid during Ms. Guthartz's and the petitioner's ownership of the subject property.

[5] Effective as of January 1, 1995, NY Real Property Tax Law §§1450-1464 and other New York statutes concerning tax enforcement were repealed by New York State Legislature and were replaced by the Uniform Delinquent Tax Enforcement Act. See NY Real Property Tax Law Article 11. However, the repeal of the statutes contained various savings clauses which permitted various municipalities to continue to enforce liens outside of the new Uniform Delinquent Tax Enforcement Act provisions, and permitted Incorporated Villages to continue to temporarily use the repealed NY Real Property Tax Law §§1450-1464 to enforce their taxes.

attempts at delivery, was unclaimed by each of the addressees.

At no point did petitioner ever offer any excuse or explanation as to why each and every one of the mailings was returned unclaimed, and has never offered any other alternative address that any further and/or different search of the public records would have revealed.

The Appellate Division, Second Department affirmed the New York Supreme Court's judgment in favor of the Village and Risman. *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2nd Dept. 2006) *lv. denied*, 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552 (2007), *reargument denied*, 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007). In doing so, the Appellate Division, Second Department, upon due consideration of this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006), correctly found the instant case to be factually inapposite to *Jones*.

Petitioner's Motion for Permission to Appeal to the New York State Court of Appeals was denied by the New York State Court of Appeals by order entered May 3, 2007. Petitioner's motion to reargue the petitioner's Motion for Permission to Appeal was denied by the New York State Court of Appeals by order entered on September 6, 2007. No motion for rehearing was ever made by the petitioner or any other party of the order which petitioner now seeks review of.

REASONS FOR DENYING THE PETITION

Not only is the petition not timely filed, but additionally, the petitioner fails to show any "compelling reasons" for the grant of the instant writ as required by Rule 10, and accordingly, the petition should be denied. The petitioner's disagreement with the Appellate Division, Second Department's August 1, 2006 Decision and Order, based on the Court's application and interpretation of the *Jones v. Flowers* decision, is not a compelling reason to grant the petition.

I. THE PETITION WAS NOT TIMELY FILED

The subject petition should have been filed within 90 days after the May 3, 2007 order of the New York State Court of Appeals denying petitioner's motion for discretionary review. Rule 13, para. 1. Petitioner's subsequent motion to the New York State Court of Appeals for leave to reargue the denial of petitioner's motion for discretionary review was not a motion for rehearing in the lower court that would extend the time for petitioning this Court. As explained in *Department of Banking v. Pink*, 317 U.S. 264 (1942), *reh'g denied*, 318 U.S. 801 (1943) a timely petition for rehearing in the lower court "operates to suspend the finality of the * * * court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." 317 U.S. at 266. In the instant case, petitioner never moved for a

rehearing relating to the judgment which petitioner now seeks review of. The decision and order of the Appellate Division, Second Department was a final adjudication of the rights of the parties and was entered by that Court on August 1, 2006. Accordingly, the instant petition was not timely filed.

II. THERE ARE NO REASONS, COMPELLING OR OTHERWISE, WHICH WARRANT THE GRANT OF THE INSTANT PETITION

The petition should also be denied because there are no conflicting decisions between the Courts, and each of the cases raised by petitioner in support of such a claim, to the extent relevant, are factually distinguishable. Furthermore, the Appellate Division, Second Department fully considered and correctly decided the issues involved and adequately distinguished this case from this Court's holding in *Jones*. The instant case represents the application of principles delineated by this Court in *Jones* to the unique and unusual set of facts and circumstances in this case. The real issue that the petitioner raises in support of its petition is whether the Appellate Division, Second Department properly considered this Court's decision in *Jones*. A review of the Appellate Division, Second Department's Decision and Order should lead to an affirmative answer. The petitioner's disagreement with Appellate Division, Second Department's application and interpretation of the *Jones* decision is not a compelling reason for the review of this case. In fact, the holding below has

limited implications, only impacts the parties herein, and the only issue to be addressed is the title to one particular parcel of land.

The law in New York, even prior to *Jones*, required that the State take additional reasonable steps to notify a property owner when notice of a tax sale sent by the State is returned undeliverable. *Kennedy v. Mossafa*, 100 N.Y.2d 1, 789 N.E.2d 607, 759 N.Y.S.2d 429 (2003) ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even where the notice is returned as undeliverable"). The Jones holding did nothing other than affirm the rule regarding notice as it already existed in New York.[6]

As correctly held by the Appellate Division, Second Department, the instant case is factually inapposite to *Jones*, including the fact that the notice of the tax sale in the instant case was previously provided by the Village. There was no supported meritorious issue raised by petitioner regarding the insufficiency of this notice. The notices that were returned unclaimed were not sent by the State, but rather were sent by Risman, the lien buyer. Regardless, Risman did take additional steps to notify the petitioner and based upon an exhaustive search of the

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[6] This Court granted certiorari in *Jones* to resolve a conflict among the Circuits and State Supreme Courts, and notably, cited the New York State Court of Appeals' case of *Kennedy v. Mossafa*, supra, as one of the cases on the "State must do something more" side of the conflict. 547 U.S. at 225.

public records, both at the County, Town, and local Village offices, sent notices not only to the petitioner, but also to the petitioner's president, and the president's wife.[7] No excuse was ever offered by the petitioner or any other party as to why the mail was returned unclaimed after repeated attempts at delivery and why there was no response to notices left regarding the attempted delivery. The Appellate Division, Second Department explained:

> [I]t is conceded that multiple mailings were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery had been made. Moreover, there is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. 32 A.D.3d at 393, 820 N.Y.S.2d at 106.

As opposed to the occupant of the property in *Jones*, the petitioner in the instant case was also obligated to follow up with certified mail. The majority in *Jones*, in reply to an argument advanced by the State, explained that it is not the obligation of a tenant to follow up with certified mail. 547 U.S. at 233. However, in the case at bar, the certified mail

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[7] *Jones* involved a certified mailing sent by the State of a notice of tax sale to a single address, and there was proof that the property owner had moved, and that nobody was at the owner's former address to sign for the letter. 547 U.S. at 222.

was sent to the petitioner at its correct address, and it was the petitioner, not some tenant or occupant as in *Jones*, that should have followed up with the certified mail. The petitioner in the instant case bore the responsibility of claiming its mail, duly and correctly addressed, to protect its ownership interests, and cannot support a due process claim while neglecting or intentionally shirking this responsibility.

This Court recently denied a certiorari petition for a writ (see *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, ___ U.S. ___, 128 S. Ct. 253 (2007)), after the Illinois Supreme Court in *Apex Tax Investments, Inc. v. Lowe*, 225 Ill.2d 208, 867 N.E.2d 941 (2007), held again, after previous remand by this Court, for the tax lien purchaser.[8] The Illinois Supreme Court in *Apex*, after remand, just like the Appellate Division, Second Department in the instant case, held that *Jones* was factually distinguishable for various reasons, including that: (1) notice of the tax sale had previously been provided by the State; (2) the returned notice was not notice of the tax sale; (3) the returned notice was not sent by the State; and (4) the lien holder did, in fact, take additional steps to

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[8] The initial Illinois Supreme Court judgment in favor of the tax lien purchaser (*Apex Tax Investments, Inc. v. Lowe*, 217 Ill.2d 1, 838 N.E.2d 907 (2005)) was vacated by this Court and the case remanded for further consideration in light of *Jones*. See *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, ___ U.S. ___, 126 S. Ct. 2287 (2006)).

notify the property owner. In *Apex*, just like the instant case, notice of the actual tax sale was previously provided by the State, and the returned certified mail[9] at issue was sent not by the State, but rather by the tax purchaser.

Lowe, like *Jones*, and unlike the instant case, involved property owners that were not present or residing at the address to which the notices were sent. Jones had moved. Lowe was hospitalized. Similarly, in *Luessenhop v. Clinton County*, 466 F.3d 259 (2nd Cir. 2006), *rev'g* 378 F. Supp. 2d 63 (N.D.N.Y. 2005), the property owner to whom notice was sent by certified mail was temporarily residing out of the Country. 466 F.3d at 262. In the instant case, there was never any dispute that each and every one of the intended recipients of the mail had simply refused to accept the certified mail.

This is not a *Jones* case where there was an innocent well intentioned property owner that had moved. This is a case about a business enterprise that without excuse, valid or otherwise, failed to claim its mail. This Court should not condone such a practice. One who desires to receive notice would claim one's mail, and not purposely avoid and refuse it. The State should not have to force notice upon a party not desiring to receive it and one who is purposely avoiding it. Such a party, one that purposely avoids notice,

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[9] The notice in Apex was returned with the notation "Person is Hospitalized".

should not be able to offer its non-receipt as the grounds for a due process claim. The petitioner and its president chose a pattern of behavior and conduct which made notice difficult or impossible to properly effectuate, and which indicated a lack of due care and diligence. The petitioner cannot blame another for the unique situation that petitioner finds itself in.

Finally, the petitioner's argument that it is appropriate for this Court to grant certiorari, vacate the judgment, and remand for further consideration ("GVR") is clearly not supported by a simple reading of the Appellate Division, Second Department's Decision and Order. It is obvious that this Court's holding in *Jones* was fully considered by the Court below, and a GVR of this case will not result in a different decision in the lower Court. The Court below did not summarily decide this matter without adequately distinguishing it from this Court's holding in *Jones*, and accordingly, a GVR order is not appropriate.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Buffalo, NY
January 3, 2008

Respectfully submitted,

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